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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

LOIS MARTIN, Individually and On Behalf of
All Others Similarly Situated,

Plaintiff,

v.

ARBOR REALTY TRUST, INC., IVAN
KAUFMAN, and PAUL ELENIO,

Defendants.

CASE No.: 1:24-cv-05347-PKC-LKE

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION OF CHARLES
C. BROOKS TO: (1) APPOINT LEAD
PLAINTIFF; AND (2) APPROVE LEAD
PLAINTIFF'S SELECTION OF
COUNSEL**

CLASS ACTION

Plaintiff Charles C. Brooks (“Movant”) respectfully submits this memorandum of law in support of Movant’s motion for an Order, pursuant to Securities Exchange Act of 1934 (the “Exchange Act”), as amended by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”):

(a) appointing Movant as Lead Plaintiff for the class of all persons or entities who purchased or otherwise acquired Arbor Realty Trust, Inc. (“Arbor” or the “Company”) securities between May 7, 2021 to July 11, 2024, inclusive (the “Class Period”); and

(b) approving Movant’s selection of The Rosen Law Firm, P.A. (“Rosen Law”) as Lead Counsel for the Class.

INTRODUCTION AND BACKGROUND

This action was commenced on July 31, 2024 against Arbor Realty Trust, Inc., Ivan Kaufman, and Paul Elenio (“Defendants”) for violations under the Exchange Act covering the Class Period. That same day, an early notice was issued pursuant to the PSLRA advising class members of, *inter alia*, the allegations and claims in the complaint, the Class Period, and of their option to seek appointment as Lead Plaintiff. *See Ex. 1* hereto.

According to the complaint, Arbor is a nationwide real estate investment trust (“REIT”) and direct lender, providing loan origination and servicing for commercial real estate assets. The complaint alleges that, during the Class Period, Defendants provided investors with false and/or materially misleading information concerning Arbor’s operational and financial health, including its balance sheet loan book and net interest income.

Then on March 14, 2023, NINGI Research published a report on Arbor (the “NINGI Report”) claiming, *inter alia*, that “[Arbor] has been hiding a toxic real estate portfolio of mobile homes with a complex web of real and fake holdings companies for more than a decade.” The NINGI Report concluded that, “Arbor hid its toxic mobile homes portfolio to

manipulate its stock price and avoid insolvency, \$599 million of Arbor’s escrows evaporated overnight, the company’s escrow balances and revenue are fake, in an Archegos-like situation \$2.5 billion of repo facilities are subject to margin call provisions, Arbor’s funding through repo desks is drying up, the CECL allowances and provisions have been severely understated to boost earnings, Arbor’s financial statements for the last twelve years cannot be trusted, and auditors, as well as the board, turned a blind eye on misstatements and misconduct.” In response to the NINGI Report, Arbor’s stock price fell from \$12.99 per share on March 13, 2023 to \$12.12 per share on March 14, 2023 and then to \$11.53 per share on March 15, 2023.

Then on December 5, 2023, Viceroy published an in-depth study of Arbor’s Jacksonville, FL properties (the “Viceroy Report”). Viceroy declared that in an “industry plagued with delusion and bad decisions, [Arbor] stands out as the worst of the worst. Viceroy’s dive into ABR’s CLOs suggest its entire loan book is distressed and underlying collateral is vastly overstated. These loans do not qualify for refinancing anywhere, and substantially all mature within the next 18 months.” Viceroy “believe(s) Arbor is a donut,” setting its price rating at “\$0.00.” In response to the Viceroy Report, Arbor’s stock price declined from \$13.86 per share on December 4, 2023 to \$13.67 per share on December 5, 2023 and then \$13.15 per share on December 6, 2023.

Then on July 12, 2024, investor concerns stemming from the NINGI Report and Viceroy Report intensified when *Bloomberg* reported that Arbor was “being probed by federal prosecutors and the Federal Bureau of Investigation in New York” and that “[t]he investigators are inquiring about lending practices and the company’s claims about the performance of their loan book.” In response to the *Bloomberg* report, Arbor’s stock price declined from \$15.53 per share on July 11, 2024 to \$12.89 per share on July 12, 2024.

As a result of Defendants' wrongful acts and omissions, and the precipitous decline in the market value of the Company's securities, Plaintiff and other Class members have suffered significant losses and damages.

ARGUMENT

I. MOVANT SHOULD BE APPOINTED LEAD PLAINTIFF

The PSLRA directs courts to consider any motion to serve as lead plaintiff filed by class members in response to a published notice of class action by the later of: (i) 90 days after the date of publication of the notice; or (ii) as soon as practicable after the Court decides any pending motion to consolidate. 15 U.S.C. § 78u-4(a)(3)(B). The PSLRA provides a "rebuttable presumption" that the "most adequate plaintiff" to serve as lead plaintiff is the person or group that:

- (aa) has either filed the complaint or made a motion in response to a notice...;
- (bb) in the determination of the Court, has the largest financial interest in the relief sought by the class; and
- (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B)(iii). As set forth below, Movant satisfies all three of these criteria, and thus is entitled to the presumption of being the "most adequate plaintiff" for the Class.

A. Movant Is Willing to Serve as Class Representative

Movant has filed herewith a PSLRA certification attesting that Movant is willing to serve as representative of the class and remains willing to provide testimony at deposition and trial, if necessary. *See Ex. 2 hereto.* Accordingly, Movant satisfies the first requirement to serve as Lead Plaintiff for the Class.

B. Movant Has the Largest Financial Interest in the Action

The PSLRA requires a court to adopt a rebuttable presumption that “the most adequate plaintiff … is the person or group of persons that … has the largest financial interest in the relief sought by the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii). “While the PSLRA does not specify how we should decide which plaintiff group has the ‘largest financial interest’ in the relief sought, most courts simply determine which potential lead plaintiff has suffered the greatest total losses.” *Takara Tr. v. Molex Inc.*, 229 F.R.D. 577, 579 (N.D. Ill. 2005). Of the *Lax/Olsten*-styled¹ factors in determining the largest financial interest, the financial loss is the most significant factor. *See In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 437 (S.D.N.Y. 2008). Indeed, “the best yardstick by which to judge ‘largest financial interest’ is the amount of loss, period.” *In re Bally Total Fitness, Sec. Litig.*, 2005 WL 627960 * 4 (N.D. Ill. Mar. 15, 2005).

Movant lost approximately \$26,040.00 in connection with purchases of Arbor securities. *See* Ex. 3 hereto. Movant is not aware of any other movant that has suffered greater losses in Arbor securities during the Class Period. Accordingly, Movant satisfies the largest financial interest requirement to be appointed as Lead Plaintiff for the class.

C. Movant Satisfies the Requirements of Rule 23 of the Federal Rules of Civil Procedure

Section 21D(a)(3)(B)(iii)(I)(cc) of the PSLRA further provides that, in addition to possessing the largest financial interest in the outcome of the litigation, the Lead Plaintiff must “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” Rule 23(a) provides that a party may serve as a class representative if the following four requirements are satisfied:

- (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the

¹ *Lax v. Merch. Acceptance Corp.*, 1997 WL 461036 *5 (N.D. Ill. Aug. 11, 1997); *In re Olsten Corp. Sec. Litig.*, 3 F.Supp.2d 286, 295 (E.D.N.Y. 1998).

representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In making its determination that the Lead Plaintiff satisfies the requirements of Rule 23, the Court need not raise its inquiry to the level required in ruling on a motion for class certification – a *prima facie* showing that Movant will satisfy the requirements of Rule 23 is sufficient. *Fuwei Films*, 247 F.R.D. at 439 (only a *prima facie* showing is required). Moreover, “typicality and adequacy of representation are the only provisions relevant to a determination of lead plaintiff under the PSLRA.” *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998).

1. Movant’s Claims are Typical

The Rule 23(a) typicality requirement is satisfied when a plaintiff’s claims arise from the same event, practice or course of conduct that gives rise to other class members’ claims and plaintiff’s claims are based on the same legal theory. *See In re Livent, Inc. Noteholders Sec. Litig.*, 210 F.R.D. 512, 516 (S.D.N.Y. 2002). Rule 23 does not require the lead plaintiff to be identically situated with all class members. *Id.*

Here, Movant’s claims are typical of the claims asserted by the Class. Movant, like all members of the Class, alleges that Defendants violated the Exchange Act by issuing false and misleading statements about the Company’s business. Movant’s interests are closely aligned with the other Class members’ and Movant’s interests are, therefore, typical of the other members of the Class.

2. Movant Is Adequate

The adequacy of representation of Rule 23 is satisfied where it is established that a representative party has the ability to represent the claims of the class vigorously, has obtained

adequate counsel, and there is no conflict between a potential representative's claim and those asserted on behalf of the class. *In re Cendant Corp. Litig.*, 264 F.3d 201, 265 (3d Cir. 2001).

Here, Movant has communicated with competent, experienced counsel concerning this case, and made this motion to be appointed as Lead Plaintiff. Movant is not aware that any conflict exists between Movant's claims and those asserted on behalf of the Class. Movant also sustained substantial financial losses from investments in Arbor securities and is, therefore, extremely motivated to pursue claims in this action.

D. Movant Is Presumptively the Most Adequate Plaintiff

The presumption in favor of appointing Movant as Lead Plaintiff may be rebutted only upon proof "by a purported member of the Plaintiffs' class" that the presumptively most adequate plaintiff:

- (aa) will not fairly and adequately protect the interests of the class; or
- (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

The ability of Movant to represent the Class fairly and adequately is discussed above. Movant is not aware of any unique defenses Defendants could raise against it that would render Movant inadequate to represent the Class.

The presumption that Movant is the most adequate Lead Plaintiff is not, therefore, subject to rebuttal. Accordingly, Movant has suffered financial losses and has the largest financial interest in this case of any timely movant and should be appointed Lead Plaintiff.

Further, before retirement, Movant worked as the Vice President of Operations at a major logistics company. He resides in Arizona, holds a bachelor's degree in Agricultural Economics, and has approximately thirty of investing experience.

II. MOVANT'S SELECTION OF COUNSEL SHOULD BE APPROVED

The PSLRA vests authority in the Lead Plaintiff to select and retain Lead Counsel, subject to the approval of the Court. 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court should only interfere with Lead Plaintiff's selection when necessary "to protect the interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa).

Movant has selected The Rosen Law Firm, P.A. as Lead Counsel. The firm has been actively researching Movant's and Class Plaintiffs' claims, including filing this action, reviewing publicly available financial and other documents while gathering information in support of the claims against Defendants. Furthermore, the firm has an extensive history of bringing significant recoveries to investors and is experienced in securities litigation and class actions, having been appointed as lead counsel in securities class actions in this District and in other courts throughout the nation. *See Ex. 4 hereto.* The firm has prosecuted numerous securities fraud class actions and other complex litigation and obtained substantial recoveries on behalf of investors.

As a result of the firm's experience in litigation involving issues similar to those raised in this action, Movant's counsel has the skill and knowledge to prosecute this action effectively and expeditiously. Thus, the Court may be assured that by approving Movant's selection of Lead Counsel, the members of the class will receive the best legal representation available.

CONCLUSION

For the foregoing reasons, Movant respectfully requests the Court issue an Order; (1) appointing Movant as Lead Plaintiff of the Class; (2) approving Movant's selection of The Rosen Law Firm, P.A. as Lead Counsel; and (3) granting such other relief as the Court may deem to be just and proper.

Dated: September 30, 2024

Respectfully submitted,

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/s/ Phillip Kim

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*[Proposed] Lead Counsel for Lead Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2024, a true and correct copy of the foregoing document was served by CM/ECF to the parties registered to the Court's CM/ECF system.

/s/ Phillip Kim